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MortgageIT, Inc.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

JESUS GUTIERREZ GALINDO AND ALICIA
GALINDO,

Debtors.

JESUS GUTIERREZ GALINDO AND ALICIA
GALINDO,

Plaintiffs,

vs.

MORTGAGEIT, INC., WASHINGTON
MUTUAL BANK, J.P. MORGAN CHASE
BANK, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., HILLTOP
FINANCIAL MORTGAGE, INC., GLORIA
GARDNER AND THANH NGUYEN,

Defendants.

Case No.: 08-53439 RLE

Adversary No. 10-05112

Chapter 13

**DEFENDANT MORTGAGEIT, INC.'S
MOTION TO DISMISS COMPLAINT IN
ADVERSARY PROCEEDING**

Date: July 29, 2010
Time: 10:30 a.m.
Place: Courtroom 3099

Compl. Filed: May 11, 2010
Trial Date: Not Yet Set

Honorable Roger L. Efremsky

Filed concurrently with:
Notice of Motion to Dismiss
Memorandum of Points and Authorities
Request for Judicial Notice

1 **MOTION TO DISMISS**

2
3 Defendant MortgageIT, Inc. ("MortgageIT"), will and hereby does move, pursuant to Federal
4 Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b)(6), for an order
5 dismissing all claims alleged against MortgageIT in the Complaint of plaintiffs Jesus Gutierrez
6 Galindo and Alicia Galindo ("Plaintiffs") in the adversary proceeding for failure to state a claim
7 upon which relief can be granted. The Court should grant MortgageIT's motion to dismiss all of
8 Plaintiff's claims pursuant to Fed. Bankr. R. P. 7009 and 7012 as well as Fed. R. Civ. P. 9 and
9 12(b)(6) on the following grounds:¹

10
11 All of Plaintiffs' claims fail because they are barred by the *res judicata* doctrine. The
12 identical claims alleged in Plaintiffs' Complaint were already dismissed by this Court in March
13 2010. In any event, each of Plaintiffs' claims fail on the following bases:

14
15 Plaintiffs' Second Claim for Violation of the Truth in Lending Act ("TILA") fails because
16 Plaintiffs do not allege facts supporting rescission.

17
18 Plaintiffs' Third Claim for Fraud fails because Plaintiffs' Complaint fails to set forth facts
19 sufficient to establish a claim for fraud against MortgageIT and the facts that are pled fail to meet the
20 heightened standard of specificity required for fraud claims.

21
22 Plaintiffs' Fourth Claim for Rescission Based Upon Violation of California Civil Code
23 Section 1632 fails because this statutory provision does not apply to MortgageIT based on the facts
24 pled in the Complaint.

25
26
27 ¹ Plaintiffs allege seven causes of action in their Complaint. Plaintiffs' first cause of action for
28 Violation of the Real Estate Settlement Procedures Act and sixth cause of action for Objection to
Claim of WaMu are directed at defendants other than MortgageIT.

1 Plaintiffs' Fifth Claim for Determination of Extent and Validity Of Lien fails because: (1)
2 Plaintiffs acknowledge that MortgageIT does not hold the current interest in the Loan; and (2)
3 Plaintiffs' fraud allegations are insufficiently pled under the heightened pleading standard.

4
5 Plaintiffs' Seventh Claim for Under California Civil Code Section 3345 fails because: (1)
6 this statutory provision provides for a form of relief, not an independent cause of action; and (2)
7 Plaintiffs fail to allege a basis for this form of relief as to MortgageIT.

8
9 The Court should dismiss all claims alleged in the Complaint with prejudice because they are
10 unsupported by the law and/or unsupported by the facts of this case as against MortgageIT for the
11 reasons explained more fully in the accompanying Memorandum of Points and Authorities.

12
13 This Motion is based on the Notice of Hearing on Motion, the Memorandum of Points and
14 Authorities filed concurrently herewith, the pleadings and papers on file herein, and upon such other
15 and further matters as may be presented at the hearing.

16 DATED: June 11, 2010.

REED SMITH LLP

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18
19 By /s/ Christopher O. Rivas
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